

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2256

To be argued by
THOMAS J. CONCANNON

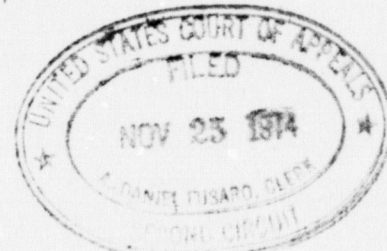
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
:
Appellee,
:
-against-
:
HENRY J. JEFFREY,
:
Appellant.
:
-----X

Docket No. 74-2256

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the Government's failure to comply with the
Prompt Disposition Rules requires a reversal of the judg-
ment of the District Court and dismissal of the indictment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) rendered on September 12, 1974, after a trial by the Court, convicting appellant of conspiracy to embezzle articles of mail which had been entrusted to an employee of the United States Postal Service, in violation of 18 U.S.C. §371, and two counts of mail embezzlement, in violation of 18 U.S.C. §§2, 1709. Imposition of sentence was suspended and appellant was placed on three concurrent terms of three-year probation, and was further fined a total of \$2,100, to be paid during the probationary period.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On March 13, 1973, appellant, a postal employee, was questioned by a postal inspector concerning the theft of mail (Record on Appeal, Document #12, at 3). Appellant admitted the thefts and signed a confession (Record on Appeal, Document #12, Exhibit #2). The postal inspector then arrested

him, and appellant was arraigned on a complaint that same day and released on his own recognizance (Minutes of June 12, 1974).

In his confession, appellant named Walter Scott as the person to whom the parcels were given. Later that day, Scott was arrested (Minutes of June 12, 1974). He was arraigned the following day, and released on a \$1,000-personal recognizance bond.

On May 1, 1973, appellant appeared before the grand jury and testified about the events at the post office, implicating Scott (Record on Appeal, Document #12, Exhibit #3). A two-count indictment was filed on May 29, 1973, charging both appellant and Scott with conspiracy to embezzle mail and embezzlement of mail.*

On June 11, 1973, appellant was arraigned before Judge Palmieri, who was presiding on that date in place of the regularly scheduled judge, Judge Wyatt. At that time, defense counsel stated that appellant intended to plead guilty. Judge Palmieri declined to take the plea, choosing instead to have Judge Wyatt take the plea upon his return (Minutes of June 11, 1973, at 2, 4). However, at this point in the proceeding, the Assistant United States Attorney, Robert Hemley, suggested that since co-defendant Scott was to go to trial, the whole case, including the proceeding in which appellant would enter his

*The indictment is "B" to appellant's separate appendix.

plea, be referred to the same judge (Minutes of June 11, 1973, at 3, 4). Judge Palmieri agreed and, in accord with Southern District Court procedure, the case was randomly assigned to Judge Gagliardi. Judge Palmieri stated he could not fix a time for appellant's pleading, and told the Assistant United States Attorney to consult with Judge Gagliardi concerning a pleading date (Minutes of June 11, 1973, at 3).

On September 24, 1973, six months and eleven days after appellant's arrest, the prosecutor filed a "Notice of Readiness for Trial." Both defendants filed motions for dismissal of the indictment because of the Government's failure to comply with Rule 4 with the Second Circuit's Plan for Prompt Disposition of Criminal Cases ("Speedy Trial Rules"). In response to the motion, Assistant United States Attorney Cooney replied that he did not file a notice of readiness with respect to appellant because he believed appellant had already pleaded guilty before Judge Wyatt on June 11, 1973. As to Scott, the Assistant United States Attorney stated he had received no reminder from the clerk's office to file a notice of readiness (Record on Appeal, Document #6, at 4). On January 17, 1974, Judge Gagliardi dismissed the indictment with respect to defendant Scott because the Government had failed to file a notice of readiness.*

*The opinion of the District Court is "C" to appellant's separate appendix. In the opinion, the Court rejected arguments by the Government that there were excludable periods under Rule 5.

On June 12, 1974, a hearing was held on appellant's motion. In that proceeding, the Government argued that in exchange for appellant's cooperation, he was to be permitted to plead guilty to one of two counts in the indictment (Minutes of June 12, 1973, at 4). Judge Gagliardi also indicated that he believed that no notice of readiness was required where the parties agree there would be no trial (Minutes of June 12, 1973, at 11). Defense counsel argued that this interpretation of the Rules was improper since the guilty plea might never be entered (Minutes of June 12, 1973, at 13).

On June 20, 1974, Judge Gagliardi denied the motion,* finding that the delay was "occasioned by exceptional circumstances" under Rule 5(h) of the Speedy Trial Rules. In his opinion, the Judge found that "in late June of 1973, the Government ... lost track of this case and neglected to file its notice of readiness.... [T]he neglect to file was inexcusable." Nonetheless, relying on United States v. Valot, 481 F.2d 22 (2d Cir. 1973), the Judge found that "the defendant's offer to cooperate and the Government's acceptance of that offer" constituted exceptional circumstances which resulted in an excludable period starting on March 13, 1973, and extending at least until June 11, 1973, the date appellant's not guilty plea was entered. The Judge found the notice of readiness to be timely, and denied the motion to dismiss.

*This opinion of the District Court is "D" to appellant's separate appendix.

On July 24, 1974, appellant went to trial on stipulated facts, and was found guilty of all counts.

ARGUMENT

THE GOVERNMENT FAILED TO COMPLY
WITH THE PROMPT DISPOSITION RULES,
AND THE JUDGMENT MUST BE REVERSED
AND THE INDICTMENT DISMISSED.

Appellant was arrested on March 13, 1973. The Government failed to file a notice of readiness under Rule 4 of the Prompt Disposition Rules until September 24, 1973, some eleven days late. Judge Gagliardi found that the United States Attorney had lost track of the case, but nonetheless denied a defense motion to dismiss the indictment because he concluded that appellant was cooperating with the Government. Citing United States v. Valot, 481 F.2d 22 (2d Cir. 1973), the Judge found that cooperation constituted "exceptional circumstances" which resulted in an excludable period from the date of arrest to "at least" the date of the indictment. The decision of the District Court was error, and the judgment should be reversed and the indictment dismissed.

In United States v. Valot, supra, the defendant was a "cooperating defendant" as that word as a term of art is understood by those involved in the practice of criminal law. Valot was released from custody in order to become an undercover informant for the Government, maneuvering on the streets to attract

sellers of narcotics to undercover narcotics officers. During the time the government agents believed Valot was assisting them in "making other cases" involving other drug sellers, the prosecutor refrained from presenting the case to the grand jury. Valot was told that the case against him was to be delayed and that the charges might be reduced or dismissed.* Valot's cooperation necessarily required at least some delay:

... [Valot] had a mission, namely, to assist the Government in enforcing the drug laws. This might have taken a week, a month, or a year to accomplish.

Id., at 25.

It was only when it became clear that Valot's narcotics activity was not solely for the benefit of the Government that the prosecutor indicated he would no longer refrain from presenting the case to the grand jury (id., at 24).

This case differs from Valot on every material characteristic of the cooperation. Appellant's assistance to the Government here was limited to revealing the details of the crime in which he was involved, and concerned only himself and his co-defendant, Scott. He was not involved either as an undercover or overt agent in "making other cases," or in ascertaining the

*As this Court wrote, in Valot:

... The Government states that in order to secure Valot's cooperation, it did not arrange for Valot to plead to the charges against him since it was possible that, for the final disposition of the case, no such action would have been required.

Id., at 24.

identity of other individuals involved in crimes. The Government knew on March 13, 1973, the date of appellant's arrest, all the information he possessed. Unlike Valot, there was no need for delay, and no public interest could be served in delaying the prosecution to learn more information. The best way for the Government to secure the benefits of appellant's assistance was to try Scott promptly. The Government failed to do this, and thus lost the right to prosecute the more culpable defendant. Indeed, until the Government "lost track" of the case, it must have perceived the situation this way, too, for appellant testified before the grand jury and was indicted within two months after his arrest, thus ending the Government's ability unilaterally to terminate prosecution in exchange for cooperation.

Further, in contrast to Valot, appellant did not benefit by having the proceeding delayed. Valot could expect greater consideration, depending on the number and importance of the cases he assisted in making for the Government. Appellant had no such leverage: after the initial interview, he had no further information to impart, and whatever benefits were to accrue to him could come only as a result of information revealed at the first interview. The stakes never changed for him. He knew the Government would indict him, and it did so. He knew that the most he could hope for was a plea to one count of the indictment. It is clear from the record below that the Government's reliance upon the cooperation argument as an excuse for

the delay was an afterthought.

Judge Gagliardi found that the Government "lost track of" this case in June 1973. This must have happened immediately after the proceeding before Judge Palmieri on June 11, 1973. Judge Palmieri advised the prosecutor who appeared before him at that time that it was necessary to schedule a date for the pleading before Judge Gagliardi, the judge assigned to the case. This was never done. Indeed, the Assistant United States Attorney who entered the case later acknowledged in his affidavit in opposition to the motion to dismiss that, without examining the docket sheet or the prosecution file, and without speaking to the assistant previously assigned to the case, he "assumed" that appellant had pleaded guilty to the crime on June 11, 1973, before Judge Wyatt. He persisted in this belief even though put on notice by the prosecutor's own procedure that the case was still pending but that no notice of readiness had been filed. Judge Gagliardi's finding that the Assistant United States Attorney had "lost track of" the case was correct; the prosecutor's failure to ascertain its status is inexcusable.

Judge Gagliardi seemed guided to his decision, at least in part, by appellant's articulated intent to plead guilty. However, this is not a valid reason for relieving the Government of the necessity of filing a notice of readiness. United States v. Furey, 500 F.2d 338 (2d Cir. 1974). In Furey, the Government's failure to file a timely notice was not excused

by defense counsel's representation that he would not object to delinquency proceedings and would consent to the adjudication. As in Furey, the Government could not rely on the assumption that the guilty plea would be entered and the need for a trial avoided. Prior to entry of the plea, appellant might have changed his mind, or the Judge might have refused to accept the plea under Rule 11 of the Federal Rules of Criminal Procedure (McCarthy v. United States, 394 U.S. 459 (1969)). Further, the notice of readiness has the additional effect, essential if the purposes of the Prompt Disposition Plan is to be accomplished, of notifying the judge that the proceedings in a case can go forward. Here, Judge Gagliardi was never advised that the case was ready to go forward, and thus could not schedule it.

The Government's inexcusable delay in filing its notice of readiness requires reversal of the judgment and dismissal of the indictment.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment dismissed.

Respectfully submitted,

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Certificate of Service

November 25, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Helen Bamberger :